# STATE OF MICHIGAN

# COURT OF APPEALS

In re CW, BW and DW, Minors.

UNPUBLISHED
February 16, 2010

CW, BW and DW,

Appellees,

and

VALERIU MARTIN and KAREN MARTIN,

Petitioners-Appellants,

v

No. 292866
Genesee Probate Court
LC No. 09-016660-AM

DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellee.

Before: Meter, P.J., and Borrello and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent.

In 2003, Genesee County Department of Human Services (DHS) placed siblings AW, born on April 9, 1993, and CW, born on November 16, 2001, with petitioners, who lived in Ingham County. Petitioners were not licensed foster parents. Rather, it was a fictive kin placement. BW, a third sibling, was born on May 2, 2004, and also placed with petitioners. Likewise, DW, a fourth sibling, was born on November 5, 2005, and placed with petitioners. All of the children were special needs children, requiring numerous doctor and therapy appointments. At some point, the rights of all four children's birth parents were terminated.

On April 23, 2007, four years after the initial placement of the children with petitioners, a complaint was filed because Karen Worden, a disabled adult who lived with petitioners, spanked and cursed at DW when he attempted to leave his stroller and enter the street. Worden did not injure DW or "le[ave] any mark." Nevertheless, petitioners' names were placed on a statewide abuse and neglect "Central Registry."

On April 24, 2007, Amy J. Barnes, an adoption specialist with Ingham County DHS conducted a preliminary adoptive family assessment. Although she concluded that the four children had bonded with petitioners, she recommended that an application for adoption be denied. Barnes noted several concerns, including: 1) the children play in a parking lot and a nearby park because of limited outside play area at petitioners' home, 2) petitioners failed to complete adoption paperwork independently and within deadlines, 3) petitioners' difficulty with providing names and addresses for their references, and 4) the presence of Worden in petitioners' home and petitioners' continued reliance on Worden for childcare despite Ingham County DHS warnings to the contrary. Barnes did not address the complaint regarding Worden and DW.

William Johnson, the Michigan Children's Institute (MCI) superintendent, testified that a team decision-making meeting was held regarding the complaint. During the meeting, the general consensus was to maintain the children's placement with petitioners and the goal remained petitioners' adoption of the children. Nevertheless, after that meeting, in June 2007, the children were removed from petitioners' home and placed with foster parents, the Rabers. The reason for the change in the consensus is unclear from the lower court record. The Rabers subsequently petitioned to adopt the children and Johnson issued a decision granting consent to adopt to the Rabers in October 2008.

While the children lived with the Rabers, an administrative law judge (ALJ) conducted a hearing regarding the April 23, 2007, complaint. The ALJ concluded that DHS failed to demonstrate abuse by petitioners or Worden. Consequently, petitioners' names were removed from the Central Registry. Thereafter, pending further investigation, Superintendent Johnson withdrew his earlier decision granting consent to adoption to the Rabers.[1]

On February 12, 2009, Johnson issued a decision denying consent to adopt to petitioners. Johnson noted that the guardian ad litem, Terina M. Carte, recommended the children return to petitioners for adoption, but that Genesee County DHS recommended the Rabers be granted consent to adoption. Ultimately, Johnson concluded that "it would not be in the best interests of [CW, BW, and DW] . . . to be removed from their current foster home and returned to [petitioners'] home for the purposes of adoption."

On March 24, 2009, petitioners filed petitions for adoption of CW, BW and DW with the trial court. They also filed a motion alleging that Johnson's denial of the consent to adopt was arbitrary and capricious. Petitioners requested an investigation regarding the petitions, including psychological evaluations of themselves, the Rabers, and the children, individually and as a sibling set, and an evidentiary hearing regarding Johnson's denial. Following the petitions for adoption and the March 24, 2009, motion, a court caseworker, Erin Cogley, was assigned to investigate and report her findings to the trial court.

On April 15, 2009, petitioners again requested psychological evaluations of themselves, the Rabers, and the children. Petitioners also moved to discover all information in the children's

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[1] DHS also placed AW in petitioners' home because she repeatedly ran away from the Rabers, and consent to adopt her is not at issue in this case.

DHS file. On May 11, 2009, respondent filed a response opposing petitioners' requests for evaluations and further discovery of the DHS file. After a hearing on the motion, the trial court denied petitioners' request for psychological evaluations, but ordered respondent to provide them with the DHS file regarding the children and all of the information Johnson considered.

On May 21, 2009, Johnson testified at a hearing. Afterward, petitioners argued that Johnson failed to consider all of the circumstances of the children and requested an opportunity to present evidence regarding those circumstances. Although the trial court questioned petitioners' ability to meet their burden of proof, it encouraged them to make an offer of proof within 14 days. On June 8, 2009, the trial court entered an order finding petitioners' offer of proof failed to address whether Johnson's consent to adoption was arbitrary and capricious. Instead, it found that petitioners merely addressed whether Johnson made the correct decision. The trial court found that petitioners failed to establish by clear and convincing evidence that Johnson arbitrarily or capriciously withheld consent and upheld Johnson's denial and dismissed petitioners' petition to adopt.

In reviewing this claim, I am mindful that the focus is not whether Johnson made the "correct" decision, but whether he acted arbitrarily and capriciously. However, such a determination can only be made by evaluating whether Johnson's articulated reasons were made without consideration for the children's individual circumstances or made whimsically, *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984), which can only be achieved by examining whether Johnson's reasons were invalid in light of the evidence. As one panel of this Court stated when considering an appeal from another of Johnson's decisions, a failure to do so would result in "review of an agency representative's decision under MCL 710.45(5) . . . amount[ing] to nothing more than a rubber stamp of whatever reason the representative articulated." *In the Matter of CLH*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2003 (Docket No. 244877), p 3.

The majority concludes based on the offer of proof, without the benefit of the actual evidence, that even if the evidence had been admitted, the outcome would not have changed. I disagree. Looking Johnson's stated reasons, I believe the excluded evidence could have changed the outcome.[2]

Johnson first relied on the fact that the children were currently placed in a different foster home, that the current foster home meets their needs, and that petitioners' ability to meet their needs was inadequate. Petitioners offer of proof indicated that they would show evidence that the children's educational and psychological well-being had deteriorated since they were removed from petitioner's home. Furthermore, Johnson's investigation into petitioners' ability to address the children's needs was limited. He testified that he did not review the children's medical, educational, mental health and attached history and that he did not consult with Davis, who oversaw petitioners' care of the children and visited their home. Because it is unclear

[2] This is not to say that I believe that petitioners have made their case. Rather, under the circumstances, I believe that they ought to have the opportunity to fully present their case and set forth all of their evidence.

whether Johnson had a complete evaluation of the circumstances of the children, including petitioners' ability to meet and needs and the children's alleged decline since being removed from petitioners' home, this evidence was directly relevant to whether Johnson's decision was well reasoned. If the evidence ultimately does not support Johnson's finding, then it is not a valid reason to deny petitioners consent.

Johnson next relied on what he labeled petitioner's failure to assure the safety and well-being of the children, because "there is no doubt that they continued to allow Ms. Worden to care and supervise the children" and that "they failed to recognize the risk of the children being cared for by Ms. Worden." Johnson testified that he did not know whether Worden had left the home after DHS informed petitioners that she would need to leave, but that he knew she was currently in the home. He conceded that the children are not currently in the home and that petitioners represented that if the children were returned, they would make sure Worden left their home. He testified, however, that he believed that, even with their record expunged, there was still a finding that petitioners had left the children in the care of Worden after they had been told not to. Again, if petitioners' evidence is able to show that Johnson failed to consider the existing actual circumstances—that is, that petitioners had taken steps to have Worden leave the home after requested by DHS and that Worden only returned after the children were removed—then this reason was also an invalid basis upon which to withhold consent.

Johnson also relied on the fact that the children had formed a stable relationship to their current family and that it was not in their best interests to remove them for adoption by petitioners. These statements are at odds with the evidence, however, because they ignore and fail to address that the children's guardian ad litem believed that adoption by petitioners was in the children's best interests and that remaining with the Rabers would mean splitting up the siblings since AW was placed with petitioners.

Finally, Johnson glosses over what I believe to be the crux of the issue in this case. The truth of the matter is, were it not for DHS erroneously placing petitioners on the Central Registry, the children would never have been removed from their care and placed with the Rabers and none of this would have occurred. Petitioners worked tirelessly and were ultimately successful in getting themselves removed from Central Registry. However, continual delays worked against them and permitted the children to remain with the Rabers. Thus, petitioners, having done nothing wrong and doing everything within their power to fix an error that was not theirs, find themselves not only without custody of the three children they have raised since the children were two years old or younger, but also without recourse. At the very least, petitioners should have been permitted to present all of their evidence before the trial court rendered its decision. Under these circumstances, I would reverse the trial court's order upholding the denial of consent to adoption and remand for petitioners to have an opportunity to present relevant evidence in support of their case.

/s/ Douglas B. Shapiro